

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

BETHANY COLLEGE,)	
)	
Respondent,)	Case 14-CA-201546 and
)	14-CA-210584
and)	
)	
THOMAS JORSCH,)	
)	
Charging Party,)	
)	
and)	
)	
LISA GUINN)	
)	
Charging Party.)	

**CHARGING PARTIES' CROSS-EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

COME NOW Charging Parties, Thomas Jorsch and Lisa Guinn, by and through counsel, and pursuant to Section 102.46(c) of the Board's Rules, file the following cross-exception to the Decision of Administrative Law Judge Christine Dibble issued on October 31, 2018. The Charging Parties combine their cross-exception and suggestions in support of the cross-exception in this single document.

Exception #1: The Charging Parties, Thomas Jorsch and Lisa Guinn, except to the decision of Administrative Law Judge on the ground that the ALJ erred in "declin[ing] to strike any portion of the Respondent's answer" as an appropriate sanction against Respondent and instead finding it sufficient to weigh the strength of the Respondent's answer based on the record evidence. (ALJD p. 13, ln. 29-30.) The ALJ should have stricken the answer, including paragraph 15 of the answer's affirmative defenses raising

a defense based on *NLRB v. Catholic Bishop*, 440 U.S. 490 (1979). As grounds for the exception, the Charging Parties rely on the cited authorities and make the argument below.

The Board has previously recognized that Bethany College's *Catholic Bishop* defense raised "genuine issues of material fact warranting a hearing." Order Denying Motion (Dec. 6, 2017). However, "the Respondent's refusal to, at minimum, present evidence showing it is exempt from the Act," (ALJ Dec. at p. 3, ll. 39-40), made it impossible for the ALJ to hold a hearing on these factual issues. The College "ignore[d] the administrative law judge's pretrial rulings on compliance with subpoenas, refuse[d] to create an evidentiary record on jurisdiction, and [did] not participate in the administrative trial in any manner." (ALJ Dec. at p. 5, ll. 43-45.) Indeed, even though "subpoenaed witnesses Joyce Pigge and Robert Carlson appeared at the administrative trial,... the Respondent refused to allow them to testify in contravention of [the ALJ's] order." (ALJ Dec. at p. 6, ll. 37-38.)

Counsel for the General Counsel aptly described the College's conduct in her brief to the ALJ:

It would be difficult to find an employer more uncooperative and more obstructive than Respondent. Respondent's utter refusal to provide evidence and take part in the hearing process is a textbook example of conduct warranting sanctions. Such conduct, if allowed, is extremely damaging to the integrity of Board procedures and to the Act itself. Respondent's obstruction should be met with the strongest and most severe evidentiary sanctions to discourage other employers from

engaging in such destructive, obstructive behavior.

(G.C.'s Post-Hearing Brief to the ALJ at p. 13.) Counsel for the General Counsel further explained why the College's "obstructive behavior" warranted striking portions of its answer, including the affirmative defense based on *Catholic Bishop*:

Because Respondent did not put on any evidence at [the] hearing Respondent's 'case' is made primarily through its Answer and pre-hearing filings. In the normal course of the hearing process, the points in these documents would be fleshed out and explored with testimony and evidence. Because Respondent did not comply with the subpoenas, and did not participate at all during hearing, Respondent should not be allowed to use these unsupported statements and allegations as grounds for any future arguments.

(*Id.* at 12.)

The ALJ agreed "that sanctions against the Respondent are appropriate." (ALJ Dec. at p. 13, ll. 7-8.) Nevertheless, the ALJ "decline[d] to strike any portion of the Respondent's answer," stating, without any explanation, that she "find[s] it sufficient to weigh the strength of the Respondent's answer based on the record of evidence." *Ibid.*

"[S]triking the Respondent's answer" is an appropriate sanction for "evad[ing]... a subpoena[s] and interfere[ing] with the Board's process." *Equipment Trucking Co.*, 336 NLRB 277, 277 n. 1 (2001). For the reasons stated by Counsel for the General Counsel, it is a particularly appropriate remedy where the College's misconduct makes it impossible for the ALJ to adequately address an affirmative defense raised by the answer.

The Respondent's affirmative defense based on *Catholic Bishop* rests entirely on the extent to which it "holds itself out as providing a religious educational environment." *Pacific Lutheran University*, 361 NLRB 1404, 1414 (2014). See *id.* at 1433 (dissenting opinion) (agreeing with majority on this point). By refusing to provide subpoenaed documents relevant to this issue and refusing to allow subpoenaed witnesses to testify, the College made it impossible to flesh out this issue and for the ALJ to determine the extent to which the College holds itself out as providing a religious educational environment. Therefore, the ALJ abused her discretion in allowing the College to rely upon its *Catholic Bishop* affirmative defense. The ALJ should have struck that affirmative defense and barred any evidence and any argument contrary to the G.C.'s position on that issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was filed with the National Labor Relations Board on this 6th day of February 2019 using the NLRB's E-File system and served upon:

Roxanne Rothschild
Acting Executive Secretary
Office of the Executive Secretary
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The undersigned hereby certifies that a copy of the foregoing served on the following on this 6th day of February 2019 using the NLRB's E-File system and a copy served upon the following via e-mail:

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